

कौटुंबिक हिंसाचारापासून महिलांचे संरक्षण अधिनियम २००५ या कायदयानुसार महिलांचे घरगुती छळापासून संरक्षण करण्याबाबत....

महाराष्ट्र शासन
महिला व बाल विकास विभाग
शासन परिपत्रक क्रमांक : याचिका-२०१५/प्र.क्र.१९०/का-२
नवीन प्रशासन इमारत, ३ रा मजला,
मादाम कामा रोड, हुतात्मा राजगुरु चौक,
मंत्रालय, मुंबई- ४०००३२
दिनांक- ३ फेब्रुवारी, २०१६.

संदर्भ : १) या विभागाचे क्रमांक- संकीर्ण २०१४/ प्र.क्र.१९/ कार्या-२, दिनांक २४ जुलै, २०१४ चे परिपत्रक.
२) मा. उच्च न्यायालय, मुंबई यांचे पत्र क्रमांक -D.D. (W.P) No-C०७ / ४३१५/१५,
Dated ६/१०/२०१५

परिपत्रक :

"कौटुंबिक हिंसाचारापासून महिलांचे संरक्षण अधिनियम २००५" या कायदयाअंतर्गत पिडीत महिलेच्या बाबतीत सेकशन-८ आणि १० खालील करावयाच्या न्यायप्रक्रियेपुर्वीच्या समुपदेशन Pre-Litigation Counseling बाबत विधी व न्याय विभागाच्या सल्ल्यानुसार तसेच महाअधिवक्ता, मा.उच्च न्यायालय, मुंबई यांचे अभिप्राय घेवून या विभागाच्या संदर्भाधिन दि. २४/७/२०१४ च्या परिपत्रकान्वये कौटुंबिक हिंसाचार कायदयाअंतर्गतील समुपदेशनासंदर्भातील सुचना शासनाने निर्गमित केल्या होत्या.

तथापि यासंदर्भातील High Court SUMOTO PIL NO- १०४ of २०१५, Dr. Jaya Sagade, Director V/s The State of Maharashtra या याचिकेमध्ये मा. उच्च न्यायालयाने त्यांच्या दिनांक ४ सप्टेंबर, २०१५ च्या आदेशान्वये या विभागाचे संदर्भाधिन दिनांक २४ जुलै, २०१४ चे परिपत्रक हे discriminatory, arbitrary and unreasonable असल्याचे नमूद करून सदरचे आदेश रद्दबातल ठरविले असून, कौटुंबिक हिंसाचारापासून महिलांचे संरक्षण अधिनियम, २००५ संदर्भातील Pre-Litigation Counseling बाबत स्वयंस्पष्ट मार्गदर्शक सुचना Guidelines / Direction पारित केलेल्या आहेत. (प्रत सोबत जोडली आहे)

यास्तव मा. उच्च न्यायालयाच्या उपरोक्त SUMOTO PIL NO- १०४ of २०१५ मध्ये मा. न्यायालयाने दिलेल्या निदेशानुसार कौटुंबिक हिंसाचारापासून महिलांचे संरक्षण अधिनियम, २००५ अंतर्गत या विभागाने निर्गमित केलेले संदर्भाधीन दिनांक २४ जुलै, २०१४ चे परिपत्रक रद्द करण्यात येत असून यासंदर्भात मा. उच्च न्यायालय, मुंबई यांच्या दिनांक ४ सप्टेंबर, २०१५ च्या आदेशान्वये कौटुंबिक हिंसाचाराच्या प्रकरणात समुपदेशनासंदर्भात मा. उच्च न्यायालयाने दिलेल्या सोबत जोडलेल्या मार्गदर्शक सुचना Guidelines / Direction प्रमाणे राज्यात कौटुंबिक हिंसाचारापासून महिलांचे संरक्षण अधिनियम, २००५ अंतर्गत कार्यरत असलेल्या सर्व समुपदेशन केंद्रांनी काटेकोरपणे कार्यवाही करावी असे या परिपत्रकाव्वारे सर्व संबंधित क्षेत्रिय अधिकाऱ्यांना कळविण्यात येत आहे.

२. सदरहु परिपत्रक आयुक्त, महिला व बाल विकास, पुणे यांनी सर्व विभागीय उप आयुक्त, महिला व बाल विकास व जिल्हा स्तरावरील सर्व जिल्हा महिला व बाल विकास अधिकारी, संरक्षण अधिकारी, बाल विकास प्रकल्प अधिकारी यांच्या निर्दर्शनास आणून त्यानुसार कौटुंबिक हिंसाचारांच्या प्रकरणात मा. न्यायालयाच्या आदेशाचे तंतोतंत पालन होईल याची त्यांनी दक्षता घ्यावी.

३. सदर शासन परिपत्रक महाराष्ट्र शासनाच्या www.maharashtra.gov.in या संकेतस्थळावर उपलब्ध करण्यात आला असून त्याचा संकेताक २०१६०२०५१३०९३४४२३० असा आहे. हे परिपत्रक डिजीटल स्वाक्षरीने साक्षांकित करून काढण्यात येत आहे.

महाराष्ट्राचे राज्यपाल यांच्या आदेशानुसार व नांवाने,

(म.बा.हजारी)

उपसचिव,

महिला व बाल विकास विभाग

प्रति,

- १) मा.राज्यपालांचे सचिव, राजभवन, मलबार हिल, मुंबई
- २) मा.मुख्यमंत्री यांचे अप्पर मुख्य सचिव, मंत्रालय, मुंबई
- ३) मा.उपमुख्यमंत्री यांचे सचिव, मंत्रालय, मुंबई
- ४) मा.मंत्री, महिला व बाल विकास यांचे खाजगी सचिव, मंत्रालय, मुंबई
- ५) मा.राज्यमंत्री, महिला व बाल विकास यांचे खाजगी सचिव, मंत्रालय, मुंबई
- ६) मा.विरोधी पक्षनेता, महाराष्ट्र विधानसभा, विधान भवन, मुंबई
- ७) मा.विरोधी पक्षनेता, महाराष्ट्र विधानपरिषद, विधान भवन, मुंबई
- ८) प्रबंधक, लोकआयुक्त व उप लोकायुक्त, कार्यालय, मुंबई
- ९) महाअधिवक्ता, मा.उच्च न्यायालय, मुंबई
- १०) महा प्रबंधक, मा.उच्च न्यायालय, मुंबई
- ११) मुख्य सचिव, महाराष्ट्र राज्य, मंत्रालय, मुंबई
- १२) अप्पर मुख्य सचिव (गृह), गृह विभाग, मंत्रालय, मुंबई
- १३) अप्पर मुख्य सचिव / प्रधान सचिव / सचिव, सर्व प्रशासकीय विभाग, मंत्रालय, मुंबई
- १४) आयुक्त, महिला व बाल विकास आयुक्तालय, पुणे
- १५) सदस्य सचिव, महाराष्ट्र राज्य महिला आयोग, मुंबई
- १६) पोलीस आयुक्त, मुंबई / पोलीस उप आयुक्त (अंमलबजावणी), मुंबई
- १७) पोलीस उपमहानिरीक्षक (महिला अत्याचार प्रतिबंध विभाग), पोलीस मुख्यालय, मुंबई
- १८) सर्व जिल्हा महिला व बाल विकास अधिकारी,
- १९) सर्व महिला समुपदेशन केंद्र (संबंधीत जिल्हयातील जिल्हा महिला व बाल विकास अधिकारी यांच्या मार्फत)
- २०) सर्व अधिकारी, महिला व बाल विकास विभाग, मंत्रालय, मुंबई

- २१) सर्व संरक्षण अधिकारी, (संबंधीत जिल्हयातील जिल्हा महिला व बाल विकास अधिकारी यांच्या मार्फत)
- २२) सर्व आश्रयगृहे, (संबंधीत जिल्हयातील जिल्हा महिला व बाल विकास अधिकारी यांच्या मार्फत)
- २३) टाटा सामाजिक विज्ञान संस्था, मुंबई
- २४) निवड नस्ती (कार्या-२).

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SUO MOTU PUBLIC INTEREST LITIGATION NO. 104 OF 2015

Dr. Jaya Sagade, Director ...Petitioner

Vs.
The State of Maharashtra ...Respondent

Ms. Jaya Sagade, Petitioner in person present

Ms. Ujwala Kajrekar for Lawyers Collective

Ms. Flavia Agnes for Majlis Legal Centre

Ms. Veena Gowda i/b. Sumangala Biradar for TISS and Stree Mukti
Sanghatana

Mr. V.B. Thadani, AGP for State

Ms. Gayatri Singh, Sr. Advocate with Vijay Hiremath for Intervener
NGO

Mr. Mihir Desai, Sr. Counsel with Mr. Chetan Mali for Intervener

CORAM : MOHIT S. SHAH, C.J. &
MRS. ROSHAN DALVI, J.

Date of reserving the Judgment: 25th July, 2015

Date of pronouncing the Judgment: 4th September, 2015

JUDGMENT: (Per Mrs. Justice Roshan Dalvi)

1. The petitioner is a service provider under the Protection of Women from Domestic Violence Act, 2005 (DV Act) as part of women's study center of the ILS Law College, Pune Maharashtra (Center) where she serves as Professor of Law. The center conducts certain workshops for judicial officers in various Districts of Maharashtra for sensitising judicial officers and other stakeholders under the DV Act like protection

and absolute in nature. She has sought to challenge the circular under her letter directed to the Chief Justice of this Court which has been treated Suo-moto as a writ petition and upon which notices have been issued upon the State of Maharashtra representing the Women and Child Department as also the other State Institutions like the police as also various institutions and organizations concerned and connected with the issues that arise under the DV Act.

5. The impugned circular dated 24th July, 2014 directs that only after the case under the DV Act is filed in Court and directions are given by the Court for counselling or mediation that counselling or mediation can be carried out and that outside agencies cannot carry out those activities without the directions of the Court. The impugned circular specifies that those agencies are only allowed to inform the aggrieved woman of her rights, make available medical and shelter home services to her and encourage her to file a case in the Court either by herself or through a protection officer. The circular is stated to have been issued in the interest of women.
6. Indeed the legislation has itself being enacted for not only the protection, but empowerment of women and for preventing violence against her. Specific orders and directions that may be required by her if she is violated can, of course,

hope that counselling and mediation would yield the necessary result ending the violence against her. Experience has also shown that in several of these cases mediation fails. counselling the woman would, therefore, have served no purpose. Consequently rules are framed by this Court to the end that the Magistrate must necessarily pass some order or direction giving the violated woman some relief so soon as an application is filed by her under Section 10 of the DV Act, be it interim or even ad-interim, even without notice to the husband or other violators, if required, in granting her a modicum of maintenance amount or a relief of injunction in respect of her residence, the residence of her husband etc., after which the direction for counselling or mediation under Section 14 of the Act could justly be passed. The State, having framed guidelines to that end would undoubtedly require some order in favour of the woman to be passed before needless elapsing of time for counselling or mediation. To that end the impugned circular would serve the deserved purpose under the Act. Hence if an application is made by a woman, an order is required to be passed as illustrated above and mediation or counselling can then begin. The petitioner would claim that she would have no complaint against such a guideline or rule.

9. However the impugned circular does not reflect the requirement of passing any order in favour of the woman

such specialised counselling.

(b) The dictionary meaning of counselling in Concise Oxford English Dictionary Indian Edition at page 326 is *advice, especially that given formally – recommend – give professional help and advice to resolve personal, social, or psychological problems.* The term counselling is defined in Black's Law Dictionary, Eighth Edition by Bryan A. Garner at page 374 also as *advice or assistance.* The term counselling is explained in Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition at page 1092 as an *act or process of giving professionally competent advice.*

The concept, therefore, would rule out mere information. It has been rightly argued before us that if only information has to be provided so as to direct a woman to the service providers and to the Court the agencies would become only "referral" agencies. They have claimed that they have had experience of counselling decades prior to the enactment of the Act. Indeed that is an aspect of which judicial notice is required to be taken. Their experience and expertise in the field would certainly be whittled down to clerical work which cannot be termed "counselling". Counselling by its very nature would include advising a woman of the right course of action to obtain access to

of specialised persons with expertise in that field that would empower her to take charge of her life to protect herself and prevent the violation. Such counselling would have to be given to the woman ideally long before she could have contemplated having access to justice. It should ideally commence when she feels and apprehends violence against her, be it physically, sexually, mentally, psychologically or economically and at least so soon as she becomes the victim of any of these. The Act has, therefore, decidedly not prohibited pre-litigation counselling. In fact it would have been a grotesquely insensitive law if it had, prone to challenge on account of the resultant arbitrariness or discrimination. Consequently there is no visible breach of any law more specially the DV Act after a woman is advised or counselled as to what is best for her. The conclusion in the impugned circular that the procedure contemplated therein would not effect her rights and would do justice to her is, therefore, seen to be without required 'sentipathy'.

(c) It is an accepted fact, and of which also judicial notice is required to be taken that there are numerous NGOs not registered as service providers under the DV Act at various levels in the society, community, religious groups beginning with the family, friends, mahila

receiving complete and correct advise / counselling. This is where a violated woman would negotiate her own spaces, no part of which can be shut from her. Consequently there is a lot of substance in the contention of the petitioner and the interveners that the circular goes against the grain of the legislation itself and is not in harmony with its provisions which opt for peace rather than war.

(e) On the other side of the spectrum must be seen the right to carry on profession of the trained and educated counselors much as lawyers would. The legal question that we would be confronted with is whether an extention of the circular could legitimately apply to lawyers. Can the State prevent a violated woman from being advised or counselled, sensitively or ferociously by a lawyer competent to practice law in the DV Courts? The resounding negative answer must legitimately apply also to counsellors who are trained in counselling as much as lawyers are trained in law to render their specialised services upon the violation of the human rights of the victim. The contention of the petitioner and the interveners that it would infringe the rights of the NGOs and the other service providers who counsel women as much as the women themselves must, therefore, be accepted.

themselves reflect the need for an aggrieved woman to avail of those services prior to accessing the Courts. The shelter homes, medical aid, legal aid are stated to be multiple entries aside from the conventional route of litigation. Such services availed of prior to litigation would be pre-litigation services. If a violated woman is entitled to those services, there is no logic or reason shown by the State as to why she would not have access to psychological or social counselling.

(i) The contention that there is no duty or power conferred upon the service providers to provide counselling or getting services because the much desired DV Act provided the destination to the violated woman to have access to expeditious and simple procedure in the Magistrate Courts would ignore the wholesome need of the woman to be correctly guided through her journey into litigation against her own family and persons otherwise closest to her. The very spirit of the legislation would require the service providers to go that extra mile in negotiating and providing for her precisely what in the facts of her case would be the most efficacious remedy – and cases of DV are like snowflakes.

(j) It has been contended before us, and of which we

with her spouse that the joint counselling can commence. We should certainly frown upon any practice that would instigate, pressurise or force her into any settlement with the husband on any issue. We deprecate such a practice if it is followed at police stations or at any other places as contended by Majlis Manch showing its ground level experience. Bad practice cannot make good law. Similarly bad practice should not unsettle good law. Good practices deserve to be backed institutionally. A practice which is not shown to be prohibited or barred in law and in fact all - pervading is, therefore, required to be supported whilst laying down guidelines for eradicating bad practices. Therefore, the remedy lies not in prohibiting the practice altogether but in rejuvenating it within reasonably prescribed mechanisms and parameters.

(k) Because certain police officers may act without sensitivity or even collude with other parties, the other dedicated police officers and even NGOs and counselors who, because of their specialized training and services have been registered under the Act, cannot be similarly treated. Treating such unequals equally would itself be discrimination. The remedy is, therefore, in training and educating as also directing the police officers to work in unison with the counselors as service

agency which is not a stakeholder under the Act for settling the matter would be to shift the case and the burden of the case upon the agency rendering similar services which that stakeholder itself is competent to render. No purpose would be served except to push the woman from pillar to post when she could avail of the same service at the door step that she has entered.

(n) The distinction sought to be made between NGOs which are registered service providers and NGOs which are non-registered is not a reasonable classification. The non-registered NGOs are stated to have graduated to have been registered as service providers. If after accumulating experience in the field, the NGOs do not have the leavey to use their expertise and talents for the best outcome which they had before, their work would degenerate. Such a distinction would be wholly arbitrary and consequently discriminatory. The NGOs not registered under the Act would continue the work of pre-litigation counselling, which may be psychological counselling, but the NGOs which are registered would not be allowed to do so. This would result in the registered NGOs withdrawing their registration to be able to conduct the counselling or other NGOs not seeking registration. The aftermath of such a scenario would be self defeating and the one not

has shown that there may be initial obstacles and failures before a lasting solution. The solution may not be only reconciliation, but amicable separation, which would end the violence upon the woman. If it is not achieved pre-litigation, it can be achieved post litigation. It is rightly stated that "a lean compromise is better than a fat law suit". This would apply as much to civil litigation as to violent victimization.

The further contention that counselling is the easy option for protection officers is to denigrate their role in a noble service. What is contemplated by a good settlement is certainly a settlement in accordance with law when power balancing is done by the counselor or the mediator between two parties having unequal bargaining strengths and not an enforced settlement derogatory to a woman's human and legal rights. Consequently we cannot accept the contention that the service providers while acting as gateways to secure justice would be barriers to women in accessing rights.

(p) Counselling the woman is a one-sided calling. It must end in a positive result. This would require the opposite party, in most cases the spouse, and his family members, to be brought before the counselors also to be consulted so that the two sides could end their disputes in an amicable solution. This service is what is

between parties to a marriage and other related parties.

5. Section 498A relating to offences of cruelty between spouses which could be referred to mediation and compounded through the High Court in a writ petition.
6. Pre-litigation desks and clinics set up in various Courts and socio-legal centers.
7. Mahila desk at the police stations.
8. The policy of law as enunciated in judicial precedents.

The purview of these laws would show the amenability of the law to encourage amicable resolution of disputes, civil as also family, rather than any bar to providing the counselling service which is not expressed under the legislation. The fact that counselling is provided would be a pointer to a presumption in favour of any kind of counselling, pre-litigation, litigation or post-litigation. The only rider is that it would be upon the volition of the woman and cannot be forced upon her.

Upon seeing the array of legislation as also practice of Courts it is inconceivable how in a case of a woman who has suffered some form of violence her counselling or even joint counselling with her spouse or

risk assessment and management which are complimentary to the negotiations for settlement. It is stated to be due to the wholesome services rendered by the service providers that several women have come forward to report domestic violence. Her prerogative in doing so cannot be snatched away by the Government. This would restrict the violated woman's avenues of using mechanisms provided by the law for redressal of her grievance.

Lawyers' Collective in its report has, therefore, rightly stated that counselling, as the first "port of call" is a remedy in itself and is a forum where women are offered a neutral, non-judgmental, safe place to decide their course of action. Hence, it is contended that in several cases, upon the consent of the woman both parties are called for negotiating a non-violent outcome.

12. All the interveners including TISS have set out their experiences of several women preferring joint counselling to settle their disputes to the tardy judicial process. They have also experienced irreversible adverse consequences to the family and intimate relationships of women who have chosen, even upon perceived constraint, the course of litigation without a chance at settlement.

13. The remedy of counselling and joint counselling is required to be followed upon using judicious discretion. It is

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settlement arrived at would not be legally binding if any party to the settlement seeks to ignore or breach it. But the consequence of a breach of any "legally binding settlement" would be no better.

The other interveners including TISS have shown a remarkable procedure adopted by them to meet ends of justice; They make the spouses sign an "Assurance Paper" to combat to the extent possible, the breach of settlement. If, however, the undesired result happens, recourse to Court as the last bastion of justice would be availed if the sagacious procedure advocated by the Lawyer's Collective is followed; a DIR is filed already, to be availed by the aggrieved woman.

15. The malaise of domestic violence is universal. It pervades wherever humans exist in varying forms and degrees and across class, caste or country lines. Various initiatives in combating violence have been undertaken globally. "**A landscape Analysis of Domestic Violence Laws**" published in December, 2013 demonstrates cases of victims and the support services provided in several countries being shelter, medical assistance, legal help, mediation services to facilitate reconciliation of parties, telephone hotlines giving free support advice and "gender desks". The legislation of some countries expressly provide for "mediation with both parties to stop violence". There are intervention centers set up in various countries that work at various levels. The

(iii) Education, Counselling and therapeutic programmes for the abuser and the victim. (pg. 24, 28 & 31)

(iv)

These are a pointer to the extensive work being done in counselling both the spouses pre-litigation and even pre-risk factors.

In fact, the DV Law is largely referred to separately and distinctly from other laws thus:

"What distinguishes DV Laws from other laws is that these laws contain provisions of multiple social services such as counselling, shelter and medical help".

This demonstrates that the "social services" are the forerunner to the legal and judicial services accessed by women and provided by the State.

We have not been able to trace any reference to a bar created by law to counselling at any stage. We may state that the best possible time for such counselling as also joint counselling is before the act of violence escalates.

16. Of course, physical violence to a woman is a complete anathema to settlement. No woman can be counselled to settle or reside with a violent husband. The danger which is contemplated by the Government in making out a case that

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venue of violence and obtain for her the required protective order from the Magistrate. In those cases, only after a modicum protection order is passed can any further conciliation be countenanced.

17. In fact, it is recommended by the Lawyers' Collective that it would be a sound practice that a DIR may be filed under Section 10(2)(a) of the DV Act after the woman consents before commencing counselling so as to constitute a record of domestic violence to be followed up by an application under Section 12, if required for seeking the reliefs under the Act. This could be complemented by the practice of executing "Assurance Paper" by the negotiating partners, which in several cases would be honoured.

The procedure may be informed to the husband along with the fact that upon any breach of the settlement entered into, the DIR would show prima facie the occurrence and record of domestic violence.

18. In a case where a woman only needs or requires a maintenance order upon she having left her shared residence or matrimonial home consequent upon any domestic violence caused to her, which may be mental, psychological or, economical, pre-litigation counselling would be the answer.

19. The Counselor must then know how far to go. We trust

The issues in this writ petition must necessarily be non-contesting. The ultimate aim is to provide a fair, just, meaningful and substantial one time settlement through negotiations for a woman.

22. We, therefore, feel compelled to set aside the impugned circular issued by the State of Maharashtra dated 24th July, 2014 as being discriminatory, arbitrary and unreasonable but not without laying down guidelines for the frame work of the pre-litigation counselling conducted by any of the registered service providers including NGOs, Counselors, police etc.

23. Hence the following order:

1. The circular issued by the State of Maharashtra dated 24th July, 2014 is seen to be discriminatory, arbitrary and unreasonable and is accordingly quashed and set aside so far as it concerns directions with regard to counselling of women who have approached any service provider including any NGO or the police or with regard to joint counselling or mediation with her spouse / husband or her family members / in-laws.

2. It is declared that any woman who has suffered any form of domestic violence as defined in the DV Act and who has accessed the services of any service